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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KERY RASHAD ROBERTS,

Defendant and Appellant.

D055085

(Super. Ct. No. SCS214986)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy R. Walsh, Judge. Affirmed.

A jury convicted appellant Kery Roberts of five counts of robbery (Pen. Code, §§ 211),¹ and one count of burglary (§ 459). Roberts admitted the truth of a prior strike conviction allegation (§§ 667, subds. (b)-(i) & 1170.12) and two prior prison term allegations (§ 667.5, subd. (b)). The court sentenced Roberts to a total prison term of 21 years 4 months.

¹ All further statutory references are to the Penal Code unless otherwise specified.

Roberts argues the trial court erred by (1) denying his motion to exclude the photographic lineup identifications, and (2) giving a flight instruction.

I

FACTS

A. Pacific Trust Bank: the First Pacific Trust Crime (Robbery, Count 1)

On August 31, 2007, around 11:00 a.m., Maria Castro was in the parking lot of the Pacific Trust Bank in Chula Vista, California. She saw a man wearing a ski mask get out of a dark green Lexus, driven by a black woman, and enter the bank. Castro called 9-1-1. Mercy Maestre, a bank employee, saw the masked man walk by her as he made his way to the teller window staffed by Joshua Torres. Maestre pulled the bank alarm.

The masked man went to Torres's window, bumped aside a customer, and demanded all of Torres's money. Torres gave him more than \$1600 and, after the man learned that was all Torres had, the masked man left the bank, passing Maestre on his way out.

Outside the bank, a passerby saw the masked man run past and start to pull up the mask but, on seeing people nearby, pulled the mask back down. He then ran around a corner and out of sight. An officer responding to the robbery call was flagged down by a female driver, who told the officer she had seen the masked man get into a green Lexus driven by a black female. Maestre later viewed the photographic lineup and selected Roberts as the robber.²

² Maestre had seen the same robber enter the same bank during the later October 30 robbery and got a better look at the robber's head, which was less obscured during the

B. Pacific Trust Bank: the Second Pacific Trust Crime (Robbery, Count 2)

On September 11, 2007, a masked man robbed the same office of Pacific Trust Bank. This time, the robber was wearing a bandanna as a mask when he approached the bank teller (Lindsey Ferreira) and demanded money. Ferreira gave the robber approximately \$1400. Ferreira later viewed the photographic lineup and selected Roberts as the robber.³

Ms. Carrillo saw the masked robber walk by her as she came out of the break room. At trial, Carrillo testified the robber she saw that day was the same person she saw rob Pacific Trust Bank on October 30, 2007.

C. CitiBank: the First CitiBank Crime (Robbery, Count 3)

On September 20, 2007, a masked man robbed a CitiBank branch in Chula Vista, California. The robber, whose face was partially masked by a white bandanna and a "do-rag," entered the bank from the back parking lot. He approached the window of teller Rodriguez and told her to empty her cash drawer. Rodriguez gave the robber numerous small denomination bills, hoping to stall for time, but when the robber asked "is that all?" she began giving him larger denomination bills. Rodriguez concealed a dye pack, which is designed to explode as it passes through the bank doors, among the larger denomination bills. The robber then left the bank.

October 30 robbery. Maestre selected Roberts from the photographic lineup based on his "facial appearance."

³ Ferreira also saw the same robber enter the bank during the later October 30 robbery. She recognized him during the latter robbery based on his height, eyes, and braided hair. She later selected Roberts from the photographic lineup based on his braided hair and skin tone.

Mr. Goodloe, a resident of an apartment building behind the CitiBank branch, was outside cleaning his car when he saw the robber (no longer wearing a mask) running through the bank's back parking lot. As the man ran past Goodloe they made eye contact, and Goodloe heard the dye pack explode and saw billowing red smoke. Another bank employee, Mr. Godinez, was returning to the bank after a late lunch via the alley near the parking lot when he saw the man, who was no longer masked, running toward him. Godinez suddenly saw red smoke coming from the man's shirt, and the man looked down at the loose money now flying about him but resumed running away from the bank. Godinez walked over to the remainder of the dye pack and money and guarded it while waiting for help to arrive.

Godinez got a good look at the unmasked face of the robber as he ran within a couple of feet of Godinez, and readily identified Roberts in the photographic lineup based on his eyes, braided hair and skin tone. Rodriguez selected Roberts from the photographic lineup based on his eyes and complexion.⁴

D. CitiBank: the Second CitiBank Crime (Robbery, Count 4)

On October 9, 2007, a masked man again robbed the Chula Vista CitiBank branch. The robber walked past Mr. Garcia and went to the window of teller Green and demanded the money, with large bills first. When Green tried to conceal a dye pack among the larger bills, the robber threw it back at her, saying "I don't want that." When Green again started to hand the robber some \$20's that contained a dye pack, the robber

⁴ Goodloe testified he was no longer able to identify Roberts in court as the person he saw running but described the robber to police as "short and stocky."

said, "Oh, no. It's the dye pack," and threw it back at her. The robber then left with approximately \$3700.

Godinez was again returning from lunch via the bank parking lot and saw a man, holding a handkerchief to his face, walking toward the bank. Godinez believed it was the same man he had seen robbing the bank on September 20 a few weeks earlier. Green later selected Roberts from the photographic lineup based on his eyes, which she described as "kind of droopy," as well as by his complexion.

E. CitiBank: the Third CitiBank Crime (Burglary, Count 5)

On October 24, 2007, a masked man entered the Chula Vista CitiBank branch. Green recognized the masked man (who was holding a white cloth over his lower face and wearing a red do-rag) as soon as he entered.⁵ As the man started toward Green's teller window, Mr. Carranza (a bank security guard) stopped him and asked him to remove the material from his face. The man declined, saying it was smoky outside. Carranza again told him to remove the material and stated that if he had a problem with removing the mask he could talk to the manager. The man refused and left the bank toward the back parking lot.

Approximately one week later, Green examined a photographic lineup, and used a business card to cover the lower half of each picture. She identified Roberts as the perpetrator of both the October 9 and October 24 crimes based on his eyes, which were

⁵ Mr. Garcia, the bank manager, also recognized the masked man as soon as he entered. Garcia had witnessed the first robbery of the Chula Vista CitiBank branch from upstairs inside the bank. Garcia selected Roberts from the photographic lineup, identifying him as the perpetrator of both the September 20 and October 24 crimes, based on Roberts's complexion and physique.

kind of "droopy." She also identified Roberts at trial as the perpetrator. Carranza also identified Roberts at trial as the perpetrator.

F. Pacific Trust Bank: the Final Crime (Robbery, Count 6)

On October 30, 2007, the Chula Vista branch of the Pacific Trust Bank was again robbed by a masked robber. Ms. Laustere (a bank employee) and Mr. Carter (her fiancé) were across the street from the bank sitting in Carter's truck when they saw an older model dark green Lexus circling the bank's parking lot. When the car finally parked, a man got out of the passenger side and walked toward the bank while tugging at his shirt as if to conceal something. He was wearing a bandanna around his neck and Carter was able to get a good look at his face as he walked behind Carter's truck. On his way into the bank, the man also passed Mr. Guerena. Another employee, Ms. Maestre, saw the man enter, and went to the bank surveillance monitors to watch him.

The masked robber again approached Ms. Ferreira, who recognized the robber as the same masked man who had robbed her on September 11. The robber asked for money, and Ferreira handed him all of the money, including certain "marked" bills whose serial numbers had been recorded. When the man was done, he calmly left the bank. As he was leaving, he brushed by Guerena, hitting Guerena in the shoulder. When Guerena asked the robber what his problem was, the robber looked Geurena in the eye, and then began running away.

Carter saw the robber leave the bank and was suspicious. Laustere called the bank and confirmed it had been robbed. Carter then saw the robber walk behind Carter's truck and head toward the Lexus. When the Lexus started moving, Carter decided to follow it.

The robber then turned and, after spotting Carter, walked away from the Lexus and moved to the opposite side of the street on foot. Carter decided to follow the Lexus and did so until patrol cars arrived, stopped it, and arrested the driver, Tasha Lewis. Carter identified Roberts at trial as the perpetrator.

While Carter was following the Lexus, Guerena got into his truck and followed the robber. When the robber realized that he was now being followed, he reached into his waistband, pulled out a gun, and held it up for Guerena to see, as if to warn him to "back off." However, Guerena continued to follow until losing him. Guerena then called 9-1-1 and, when police arrived, told them the direction the robber had been traveling when he lost contact. Guerena identified Roberts at trial as the perpetrator.

A few minutes after Guerena lost sight of the robber, Ms. Holden (who lives in an apartment a few blocks from the Chula Vista branch of the Pacific Trust Bank) heard a knock on her door. When she answered, the man who knocked claimed his car had broken down and asked to use her telephone. After the man told her his true name (Roberts) and showed her identification, she handed him her cellular telephone. Roberts made a couple of calls and ultimately reached Ms. Mangat to ask for a ride. By this time, Holden could hear a helicopter circling and broadcasting Roberts's description and name. Roberts asked if he could buy some clothes from her, offered \$100 for a shirt, and pulled out a wad of bills in a yellow handkerchief. He also asked if he could stay for a while but she refused. However, Mangat then arrived and honked, and Roberts left. Holden called 9-1-1.

Police recovered many items of clothing outside Holden's apartment. DNA testing confirmed the clothing was connected to Roberts. Holden also readily identified Roberts in both the subsequent photographic lineup and at trial.

G. Other Evidence

On the day of the final robbery, police searched a home in which Roberts, along with Dalita Roberts (Roberts's mother) and Tasha Lewis, lived at the time of the robberies. The home was owned by Mr. Wilcox, Dalita's ex-boyfriend. Wilcox was then living in Texas, but had left his "money green" Lexus for Tasha Lewis to use. At trial, Wilcox testified he immediately recognized his car, with its distinctive dents and "money green" paint, in the bank surveillance videos from two of the Pacific Trust robberies. He also testified he was shocked when he saw the two videos and recognized Roberts, whom he had known for 13 years. When police searched the home, they found evidence Roberts was living in a converted garage on the property. They also saw a boxed 50-inch plasma television in the living room, and Roberts's mother could neither produce a receipt for the television nor state where it had been purchased. During a second search several days later, police also found a red bandanna.

Tasha Lewis was driving Wilcox's green Lexus when she was arrested a few blocks from site of the October 30, 2007, robbery. She had driven Roberts to the bank that day, and had also driven Roberts to the first Pacific Trust Bank robbery using the Lexus. She identified Roberts as the robber depicted on the surveillance videos from both banks. She also testified Roberts had paid her to braid his hair. The cash he used to pay her had red dye on it.

ANALYSIS

A. The Photographic Identification

Roberts argues the trial court erred in denying his motion to exclude the photographic identifications. He alleges his skin complexion was significantly darker than those of the other five African American males whose photographs were included in the photographic lineup, which was enough to render the photographic identification unduly suggestive.

Legal Framework

"Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable." (*People v. Yeoman* (2003) 31 Cal.4th 93, 123.) The defendant bears the burden of showing the identification procedure used in any case was suggestive and unreliable. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.)

"The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.] In other words, '[i]f we find that a challenged

procedure is not impermissibly suggestive, our inquiry into the due process claim ends.' " (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

To evaluate suggestiveness in a witness identification procedure, the above factors are considered to determine " '[t]he question [of] whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' " (*People v. Cunningham* (2001) 25 Cal.4th 926, 990.) Although our review is deferential to the trial court's findings of fact that involve credibility determinations, we independently review the trial court's ruling "that a pretrial identification procedure was not unduly suggestive." (*People v. Kennedy* (2005) 36 Cal.4th 595, 609.)

Analysis

Roberts argues the photographic identification was unduly suggestive because his complexion was significantly darker than that of the men in the other photographs contained in the lineup shown to the witnesses. Although the courts have condemned a procedure as unfair when it " 'suggests in advance of identification by the witness the identity of the person suspected by the police' " (*People v. Ochoa, supra*, 19 Cal.4th at p. 413), the courts have also recognized that "[b]ecause human beings do not look exactly alike, differences are inevitable. The question is whether anything caused defendant to 'stand out' from the others in a way that would suggest the witness should select him." (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.) Stated differently, " 'there is no requirement that a defendant in a lineup must be surrounded by people nearly identical in appearance' " (*People v. Blair* (1979) 25 Cal.3d 640, 661), and instead, "the crucial issue is whether appellant has been singled out and his identification made a foregone

conclusion under the circumstances [citation]." (*People v. Faulkner* (1972) 28 Cal.App.3d 384, 391, disapproved on other grounds by *People v. Bustamante* (1981) 30 Cal.3d 88, 102.)

Based on our independent review of the photographic lineup, we agree with the trial court that it was not unduly suggestive. As the Court held in *People v. Johnson* (1992) 3 Cal.4th 1183, where, as here, "[a]ll of the photographs were of Black males, generally of the same age, complexion, and build, and generally resembling each other," the fact there were some differences among the various photographs did not "render the lineup impermissibly suggestive." (*Id.* at p. 1217.) For example, a distinction such as the "increased depth of shading and sharpness of detail" of the defendant's photograph in *People v. De Angelis* (1979) 97 Cal.App.3d 837, 841 did not make that lineup procedure unduly suggestive. Additionally, the court in *People v. West* (1984) 154 Cal.App.3d 100 similarly concluded the "'yellow cast'" of the defendant's photograph did not make the lineup procedure unduly suggestive. (*Id.* at p. 105.)

Roberts's sole claim that the photographic lineup was unduly suggestive was because his photograph (No. 3 in the lineup) appeared to have the darkest skin color of the six depicted men, and therefore he "stood out" from the others. We reject this argument, for several reasons. First, as the trial court noted, at least one other man (No. 1 in the lineup) appeared to have darker skin color than the others. Moreover, to the extent Roberts claims he "stood out" from the others based on one characteristic (his skin color), others also stood out, albeit for other reasons: only one man (No. 2 in the lineup) stood out by his hair style; only one man (No. 4 in the lineup) stood out by his more angular

head shape; only one man (No. 5 in the lineup) stood out by appearing to be shirtless in the picture; and, only one man (No. 6 in the lineup) stood out from the others by his mien. As the *West* court noted, the fact defendant's face had a "yellow cast" was unpersuasive because two other photographs also had distinct (albeit different) color "casts," and *West* concluded such "minor variations in these photographic lineups do not render them unduly suggestive." (*People v. West, supra*, 154 Cal.App.3d at p. 105.) Thus, there is no basis for us to conclude the purported difference in skin tone caused Roberts to " 'stand out' from the others *in a way that would suggest the witness should select him.*" (*People v. Carpenter, supra*, 15 Cal.4th at p. 367, italics added.)

Central to our decision is the consideration that Roberts's photograph was surrounded by photographs of men of similar build and age; some of the men had facial hair analogous to Roberts; some of the men had analogous hairstyles; and, at least one man had an analogous skin tone.⁶ Standing alone, the photographic display is sufficiently neutral and not unduly suggestive. Because "[w]e thus conclude that the identification procedures employed in this case were not unnecessarily suggestive[,] . . .

⁶ Because each of the photographs depicted a man who either shared at least some (but not necessarily all) of the distinctive facial characteristics exhibited by Roberts, or had some other characteristic which at least "stood out" as much as did Roberts's skin tone, we are unpersuaded by his reliance on *People v. Caruso* (1968) 68 Cal.2d 183. The *Caruso* court concluded a live line-up was unduly suggestive because of "its grossly unfair makeup." (*Id.* at pp. 187-188.) Caruso, the defendant, was "of imposing stature, being 6 feet 1 inch tall, and weighing 238 pounds[,] . . . of Italian descent, with a very dark complexion, and [had] dark wavy hair," and the evidence indicated "the other lineup participants did not physically resemble defendant. They were not his size, not one had his dark complexion, and none had dark wavy hair," which rendered the defendant "singularly marked for identification." (*Id.* at p. 187, fn. omitted.) No analogous disparity was present in the photographic lineup here.

we need not go on to the second step . . . to determine whether the identification itself was nevertheless reliable under the totality of the circumstances." (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1218.) Roberts's due process rights were not infringed by the admission of evidence of the photographic identification of Roberts by the witnesses.

B. The Flight Instruction

During jury instruction discussions, Roberts objected to instructing with CALCRIM No. 372, the so-called "flight instruction." The prosecutor responded that it intended to rely on Roberts's flight from the scene of the last robbery as evidence of consciousness of guilt, and the in-court identification of Roberts (by Mr. Guerená) showed it was Roberts who took flight from the last robbery, and therefore the instruction was clearly relevant and appropriate. The court, after noting that Ms. Holden *also* identified Roberts as the person seeking to avoid detection after that robbery, agreed to give the instruction.

Roberts, relying primarily on *People v. Anjell* (1979) 100 Cal.App.3d 189 and its progeny, contends the trial court prejudicially erred by instructing the jury with CALCRIM No. 372 because identity of the perpetrator of the crimes in this case was in issue. We find no instructional error in this regard. Contrary to Roberts's position that a flight instruction should not be given whenever identity is the main issue or an issue in the case, the California Supreme Court's subsequent decision in *People v. Mason* (1991) 52 Cal.3d 909 specifically disapproved the "overly broad dictum" in *Anjell* and cases following *Anjell* regarding use of the flight instruction when identity was a contested issue. (*Mason*, at p. 943 & fn. 13.) The court in *Mason* stated, "[i]f there is evidence

identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt,' then it is proper to instruct on flight. [Citation.] 'The jury must know that it is entitled to infer consciousness of guilt from flight and that flight, alone, is not sufficient to establish guilt. [Citation.] The jury's need to know these things does not change just because identity is also an issue. Instead, such a case [only] requires the jury to proceed logically by deciding first whether the [person who fled] was the defendant and then, if the answer is affirmative, how much weight to accord to flight in resolving the other issues bearing on guilt. The jury needs the instruction for the second step.' " (*Id.* at p. 943.) Thus, a flight instruction is correctly given when there is substantial evidence of flight by the defendant apart from his identification as the perpetrator, from which the jury could reasonably infer a consciousness of guilt. (See, e.g., *People v. Pensinger* (1991) 52 Cal.3d 1210, 1245.) The giving of a flight instruction is therefore proper when there is substantial evidence the defendant fled and such flight reflected a consciousness of guilt, regardless of the strength of the evidence the defendant was the person who committed the charged crimes. (*Pensinger*, at p. 1245; *Mason*, at p. 943; see also *People v. Avila* (2009) 46 Cal.4th 680, 710 [flight instruction "proper even when identity is at issue"]; cf. *People v. Rogers* (2009) 46 Cal.4th 1136, 1170-1171, fn. 19.)

Here, even though Roberts asserted that some of the identifications of him as the perpetrator of the robberies were tainted by the photographic lineup and other factors, he was positively identified by Guerena as the man who fled from the last robbery, and there is no suggestion that Guerena's identification of Roberts (based on Guerena's view of Roberts's unmasked face as he went into the bank and while Guerena pursued him after

Roberts left the bank) was in anyway reliant on the photographic lineup. Additionally, Ms. Holden also positively identified Roberts, and there was ample evidence from which the jury could conclude her in-court identification of Roberts was based on her lengthy close-up view of his unmasked face as well as the fact he told her his true name and showed her his true identification, and was not based on any alleged taint from the photographic lineup. She also testified to Roberts's conduct seeking to avoid detection. The testimony provided enough evidence from which a reasonable jury could find flight to avoid apprehension and "that [Roberts's] movement was motivated by a consciousness of guilt." (*People v. Ray* (1996) 13 Cal.4th 313, 345.) The trial court properly gave the flight instruction in this case.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

AARON, J.